

Practice Update

Employee Retirement Plans: Cost-Saving Measures and Increasing Employee Monetary Access During COVID-19

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By Mary Samsa

With today's uncertainties, employers are addressing their own short term cash needs as well as their employees'/former employees' ability to support themselves financially in these trying times. Consequently, employers are reviewing their sponsored retirement plans from both a cost-savings standpoint as well as a vehicle for providing interim financial assistance to their employees impacted by COVID-19.

Below is a high-level summary of certain options that an employer can explore for purposes of finding some workable solutions. It is important to note that different retirement plans may have different requirements for implementing any of the below options. This is not a full analysis of any legal requirements, and it is recommended that you discuss such options with your Akerman contact to understand any potential limitations.

Potential Cost-Saving Measures

Defined Contribution Plans

- **Prospective suspension of employer matching contributions:** This measure does not have to be permanent, and temporary suspension can provide some relief from current cashflow issues.

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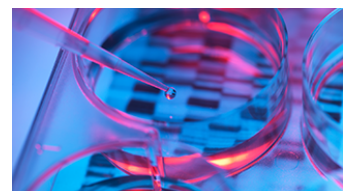
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Depending on whether the plan is a safe-harbor plan or not, advance notice requirements may be required prior to implementing any such suspension.

- **Reduction of discretionary employer contributions:** This measure simply exercises the company's discretion to not make an employer contribution for the 2020 plan year or reduce such employer contribution to better align with the current economic environment.

Defined Benefit Plans

- **Soft freeze of the plan:** This measure freezes the plan to prospectively stop the inclusion of new participants into the plan. As such, it manages the liability of the existing participant base (who continues to participate) but does not otherwise increase its overall ongoing liability by effectively closing the plan to new participants.
- **Hard freeze of the plan:** This measure is a complete freeze of the plan as to both new participants AND further prospective accruals. By turning off the further accrual of liability, the employer can simply manage the liability accrued through the date of the freeze. This measure is subject to strict timing and notification requirements before implementing.

Nonqualified Deferred Compensation Plans

- Because these arrangements are subject to Section 409A of the Internal Revenue Code of 1986, which have rather stringent requirements for adjusting actions under these plans, the flexibility associated with these plans are very limited. *Depending on the wording of the nonqualified plan and the rights of participants to an employer contribution*, an employer may be able to (1) choose not to make an employer contribution for the 2020 plan year, or (2) delay any crediting of a contribution to a participant's account to a later than usual date (to manage the

amount of “earnings” to which the participant becomes entitled). **NOTE:** If a company is experiencing an downturn in financial health, it will be prohibited during this time period from terminating and liquidating an existing nonqualified plan.

Increasing Employee Access to Retirement Assets

Defined Contribution Plans

Implementing temporary COVID legislation:

- This measure has temporary applicability and gives participants potentially greater access to their retirement assets to ease financial stress. Those measures which can be added to plans include:
 - Permitting COVID-19 related distributions (i.e., must be impacted by COVID-19) of potentially up to \$100,000 of their retirement assets (available through 12.31.20); and/or
 - Increasing accessible loan amounts (until 9.24.20) of up to a maximum of \$100,000 (or 100 percent of their vested account, if lower); and
 - Suspension of Required Minimum Distributions for the 2020 plan year: For participants required to take minimum distributions whose account value may have been detrimentally impacted during the last month, these required distributions are suspended to allow time for their accounts to return to a more determinative value.

Defined Benefit Plans

- **Adding or reducing the in-service withdraw age to 59.5:** Although not legally required, defined benefit pension plan may permit participants to commence their pension benefits as early as age 62 while still employed. The SECURE Act of 2019 lowered this minimum age for defined benefit

pension plans to 59.5. Plan sponsors can consider whether to amend their pension plans prospectively to provide for this in-service distribution; however, once adopted, this type of feature would remain permanent.

Nonqualified Deferred Compensation Plans

- **Unforeseeable Emergency Distributions:**
Although this provision and feature is not new, an unforeseeable emergency distribution is one of the few measures that can be used under a nonqualified plan for purposes of accelerating a distribution to a participant. If allowed pursuant to the terms of the nonqualified plan and the employer determines that an unforeseeable emergency has occurred, the amount of the distribution must be limited to the amount reasonably necessary to satisfy the emergency need AND take into account other sources of income available to the participant and ability to liquidate other assets. **Keep in mind that this is a relatively high standard.** NOTE: Cessation of employee deferrals for a given plan year are generally not permitted under Section 409A. However, they may be cancelled if an employee experiences an unforeseeable emergency or takes a hardship distribution from the employer's defined contribution plan. Deferrals would only be eligible to resume via an election for the next plan year.

We know that these times can feel, at moments, overwhelming, and we know that companies must make decisions at lightning-quick speed. That said, Akerman is willing and able to assist in developing workable solutions and to assist in managing those moments. If you would like any further information on the above strategies, please reach out to your Akerman contact.

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